STATE OF MICHIGAN

COURT OF APPEALS

PATSY L. FRENCH,

Plaintiff-Appellee,

v

COUNTRYWIDE HOME LOANS, INC., d/b/a AMERICA'S WHOLESALE LENDER,

Defendant/Third-party Plaintiff-Appellant.

and

JOHN D. FLYNN, Personal Representative of the Estate of CALVIN GREEN FRENCH, JR.

Third-party Defendant.

UNPUBLISHED
April 30, 2009

No. 282718
Muskegon Circuit Court
LC No. 06-044752-CH

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's final judgment entered November 5, 2007. We affirm.

On February 7, 1972, plaintiff, Patsy French, took title to the disputed property with her husband, Calvin French, through a recorded warranty deed. Both plaintiff and her husband executed a mortgage with Huntington Bank on February 11, 1999, which was assigned to GMAC on October 2, 1999.

On October 31, 2000, plaintiff and her husband were divorced, and both parties held title to the property as joint tenants with full rights of survivorship. Further, the Judgment of Divorce granted plaintiff the exclusive right to possession and required her husband to pay any mortgage on the property. Following their divorce, plaintiff and Mr. French entered into a mortgage with Republic Bank on January 29, 2003. Mr. French then refinanced the property by executing a promissory note and mortgage in favor of defendant, Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender. Mr. French was the sole borrower on this mortgage, as well as the only person who initialed and signed the mortgage agreement. The trial court found that the funds from this latter mortgage were used to satisfy the Republic Bank mortgage.

Mr. French died on April 25, 2006. Defendant then contacted plaintiff with a demand that she pay the loan and threatened to foreclose on the property. On September 1, 2006, plaintiff filed a complaint alleging two claims: a request for declaratory judgment because defendant's mortgage was extinguished on the death of Mr. French and slander of title. Plaintiff then moved for summary disposition pursuant to MCR 2.116(C)(10), on the issue that defendant's mortgage was extinguished upon the death of Mr. French and defendant is not entitled to equitable subrogation. On January 30, 2007, the trial court granted partial summary disposition in favor of plaintiff on the issue of extinguishment of the mortgage and that defendant was not entitled to equitable subrogation; however, it noted that since plaintiff did not discuss Count II (slander of title) in her motion or brief, it declined to adjudicate those issues. Finally, the trial court issued a judgment concluding that plaintiff had no cause of action regarding her claim for slander of title and that defendant was not entitled to relief under the doctrine of unjust enrichment either as a claim or a defense.

Defendant first argues that its mortgage was not extinguished on the death of Mr. French, and thus the trial court improperly granted plaintiff's motion for summary disposition under MCR 2.116(C)(10) on this issue. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The Court also must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id.*

This Court in *Townsend v Chase Manhattan Corp*, 254 Mich App 133, 136; 657 NW2d 741 (2003) held:

> It is settled law in Michigan that, while survivorship rights in an ordinary joint tenancy may be destroyed by an act that severs the joint tenancy, survivorship rights cannot be destroyed where the grant is to "joint tenants with right of survivorship" (or some reasonable variation in wording). *Albro v Allen*, 434 Mich 271, 287; 454 NW2d 85 (1990). Thus, where the conveyance includes express words of survivorship, what is created is a joint life estate with dual contingent remainders (i.e., a contingent remainder in fee to the survivor). *Id.* at 277; 454 NW2d 85. Thus, no act of a co-tenant can defeat the other co-tenant's right of survivorship.

In *Townsend*, the plaintiff and his mother purchased property as "joint tenants with full rights of survivorship." *Id.* at 134. The plaintiff's mother then executed a mortgage on the property, but plaintiff was not a party. *Id.* Following his mother's death, the plaintiff made no payments on the mortgage, and notified the defendant that the mortgage did not survive his mother's death. *Id.* This Court held that plaintiff's mother had a life estate coupled with a

contingent remainder interest in fee in the property, and that the defendant's interest was against such property; thus, once his mother's property interest was extinguished, so was the defendant's interest. *Id.* at 140.

In this case, the Judgment of Divorce between plaintiff and her husband clearly ordered that they hold the property as joint tenants with full rights of survivorship. Thus, because plaintiff was a joint tenant with full rights of survivorship, she became sole owner of the property by operation of law on Mr. French's death. *Albro, supra* at 275.

Further, plaintiff did not pledge her interest in the property against the mortgage between defendant and Mr. French. It makes no difference that plaintiff had previously encumbered the property because the satisfied mortgage was not with defendant, and plaintiff never pledged her interest against defendant's mortgage. In *Townsend,* this Court focused on the mother's interest because she was the only person who pledged her interest to the defendant. *Townsend, supra* at 137. Similarly, the focus here concentrates on Mr. French's interest because he was the only person who pledged his property interest to defendant. Therefore, defendant's interest was against Mr. French's property interest, which extinguished upon his death. Accordingly, there is no evidence creating a genuine issue of material fact as to whether plaintiff is liable under the disputed mortgage and we affirm the trial court's granting of plaintiff's motion for summary disposition on this issue.

Defendant next argues that the trial court also erred in granting plaintiff's motion for summary disposition on the issue that it was a mere volunteer because it paid the proceeds of the mortgage as a result of mistake. We disagree. Equitable subrogation is "a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Hartford Accident & Indemnity Co v Used Car Factory, Inc,* 461 Mich 210, 215; 600 NW2d 630 (1999). However, a subrogee cannot be a "mere volunteer," but must have paid the debt to fulfill a legal or equitable duty owed to the subrogor. *Ameriquest Mortgage Co v Alton*, 273 Mich App 84, 95; 731 NW2d 99 (2006). In fact, "the doctrine of equitable subrogation was never intended for the protection of sophisticated financial institutions that can chose the terms of their credit agreements. Such lenders are 'mere volunteers' and may not benefit from this equitable remedy under Michigan law." *Deutsche Bank Trust Co Americas v Spot Reality, Inc,* 269 Mich App 607, 614-615; 714 NW2d 409 (2005). Finally, a new mortgagee cannot take priority over an older mortgagee, as part of a generic refinancing transaction, under the doctrine of equitable subrogation simply because the proceeds of the new mortgage were used to satisfy the older mortgage. *Washington Mut Bank, FA v ShoreBank Corp,* 267 Mich App 111, 119-120; 703 NW2d 486 (2005).

In this case, defendant executed its mortgage with Mr. French as part of a generic refinancing transaction. It did not make any agreement with plaintiff, nor did she make any agreement with defendant in terms of the mortgage with Republic Bank, or in any regards to the mortgage between defendant and Mr. French. Thus, defendant had no legal or equitable obligation to satisfy the Republic Bank mortgage for plaintiff, establishing its status as a mere volunteer.

Further, with regards to notice in real estate law,

> [w]hen a person has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries concerning the possible rights of another in real estate, and fails to make them, he is chargeable with notice of what such inquiries and the exercise of ordinary caution would have disclosed. [*Kastle v Clemons,* 330 Mich 28, 31; 46 NW2d 450 (1951).]

Defendant was on constructive notice of plaintiff's interest in the property. In its brief on appeal, defendant admits that it relied on the provisions of the Judgment of Divorce between plaintiff and Mr. French. Such reliance could also be interpreted to show that defendant was on constructive notice that plaintiff owned title in the property as a joint tenant with rights of survivorship, thus diminishing defendant's claim that it executed the mortgage with Mr. French by mistake.

Moreover, we reject the notion that the trial court's judgment results in a windfall to plaintiff. Plaintiff received exactly what she was entitled to under the Judgment of Divorce and no more. Mr. French transferred the risk of his not living up to obligations under the Judgment of Divorce from plaintiff to defendant. Defendant was under no obligation to assume that risk. It could have refused to take the mortgage. That defendant improvidently assumed the risk does not transform plaintiff's rights under the Judgment of Divorce into a windfall.

Because there was no evidence establishing a genuine issue of material fact as to whether defendant was a "mere volunteer," and thus not entitled to equitable subrogation, we affirm the trial court's granting of plaintiff's motion for summary disposition.

Finally, defendant argues that the trial court erred in its final judgment by concluding that the doctrine of unjust enrichment was inapplicable as either a claim or defense by defendant. Specifically, defendant argues that plaintiff was unjustly enriched because its mortgage was clearly made at the request of Mr. French for the benefit of plaintiff because he used the money to satisfy the prior mortgage. We disagree. Whether a specific party has been unjustly enriched is generally a question of fact. See *Dumas v Auto Club Ins Ass'n,* 168 Mich App 619, 637; 425 NW2d 480 (1988), rev'd on other grounds 437 Mich 521; 473 NW2d 652 (1991); see also *Hayes-Albion Corp v Kuberski,* 421 Mich 170, 186; 364 NW2d 609 (1984). However, whether a claim for unjust enrichment can be maintained is a question of law, which we review de novo. *Liggett Restaurant Group, Inc v Pontiac,* 260 Mich App 127, 137; 676 NW2d 633 (2003). Finally, we review a trial court's dispositional ruling on an equitable matter de novo. *Morris Pumps v Centerline Piping, Inc,* 273 Mich App 187, 193; 729 NW2d 898 (2006).

Even though two parties may not have an express contract, under the equitable doctrine of unjust enrichment, " 'a person who has been unjustly enriched at the expense of another is required to make restitution to the other.' " *Id.* quoting *Michigan Ed Employees Mut Ins Co v Morris,* 460 Mich 180, 198; 596 NW2d 142 (1999). Under a claim for unjust enrichment, a plaintiff must establish: (1) the receipt of a benefit by the defendant from the plaintiff and, (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Id.* at 195. Thus, the law will imply a contract only if the defendant has been unjustly enriched at the plaintiff's expense. *Id.*

In this case, there was no express contract between plaintiff and defendant. Defendant argues that plaintiff received a benefit in that she was able to live on the property free and clear

of the Republic Bank mortgage. We agree with this argument because plaintiff was liable under the Republic Bank mortgage because she signed the agreement along with Mr. French. Thus, she benefited because she was ultimately released from such mortgage once Mr. French paid it in full with defendant's mortgage.

However, defendant cannot show evidence supporting the second element of unjust enrichment: an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Morris*, *supra* at 195. In *Morris*, this Court held that

> "[a] third party is not unjustly enriched when it receives a benefit from a contract between two other parties, where the party benefited has not requested the benefit or misled the other parties . . . . Otherwise stated, the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person." [*Id.* at 196, quoting 66 Am Jur 2d, Restitution and Implied Contracts, § 32, p 628.]

In this case, defendant did not present any evidence that plaintiff requested the benefit from defendant or that she misled any of the parties to acquire the benefit. As mentioned above, she did not sign the mortgage agreement between Mr. French and defendant, and there is no evidence that suggests she requested to be such party or any request for such proceeds. Thus, although plaintiff did benefit from defendant's mortgage with Mr. French, she was not unjustly enriched and we affirm the trial court's judgment.

Affirmed.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro